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Access to Health Care for Elderly Immigrants

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The number of persons aged sixty-five and over in the United States is increasing and it is expected to more than double by the year 2050.[1] Concurrently, the cost of providing health care to the elderly is expected to increase by 270% between 1995 and 2020, with almost two-thirds of those costs borne by public programs.[2] Therefore, an increase in the elderly population will pose challenges for Medicare, Medicaid, and our healthcare system as a whole.[3] Policymakers have begun to debate plans for handling these challenges.[4] Legislation governing undocumented workers, and, in particular, their access to public benefits, is critical to this debate.[5] This comment argues that our current approach of limiting immigrant access to federal healthcare programs for the elderly is not only unjust, but also shortsighted, as it will increase the costs to society of providing health care to an aging immigrant population and to our elderly population as a whole.

Part I of this comment describes characteristics of the immigrant population in the United States. Part II discusses amendments to the Medicare and Medicaid programs since 1996 that limit immigrant access. Following the discussion in Part III regarding proposed legislation that further limits immigrant access to Medicare and Medicaid, Part IV explains

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1. JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., U.S. POPULATION PROJECTIONS: 2005-2050 i, 20 (2008), http://pewhispanic.org/files/reports/85.pdf.

2. Victor R. Fuchs, *Health Care for the Elderly; How Much? Who Will Pay For It?*, 18 HEALTH AFFAIRS 12, 12 (1999).

3. *See generally* MARK W. STANTON, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, THE HIGH CONCENTRATION OF U.S. HEALTH CARE EXPENDITURES 1 (2006), http://www.ahrq.gov/research/empspria/empspria.pdf.

4. *See id.*

5. The term "undocumented worker" is used in lieu of "illegal alien" through this comment.

the consequences of this approach, and Part V offers a legislative recommendation.

I. IMMIGRANT POPULATION IN THE UNITED STATES

The percentage of U.S residents who are immigrants has increased dramatically since 1970.[6] In 2007, one in eight U.S. residents immigrated to this country during his or her lifetime.[7] This ratio increased from one in twenty-one, to one in sixteen, to one in thirteen in 1970, 1980, and 1990, respectively.[8] If the current rate of immigration continues, projections indicate that one in five U.S. residents will be foreign-born by 2050.[9]

Just as the total number of immigrants in the United States has increased since 1970, the percentage of immigrants here illegally—or without valid documentation[10]—has also increased. In 2007, one in three immigrants was here illegally.[11] More than half of those here illegally arrived between 2000 and 2007.[12] The average age of an immigrant in 2007 was 40.5, very close to the average age of a native-born citizen in 2007, which was 35.9.[13] This number has remained constant and is expected to remain so in the future.[14] Therefore, the population of immigrants is expected to age at the same rate as the general population.[15] Additional research indicates that the overall impact of immigration on the age structure of American society is relatively small; accordingly, the level of immigration does not significantly contribute to the problems associated with an aging society.[16]

Despite the significant increase in the undocumented worker population and inherent legal barriers to employment, immigrants are more likely to be employed than natives. Eighty-two percent of immigrant households have at least one worker compared to 73% of native households.[17] Nonetheless, all immigrants, documented and undocumented, are more likely to lack

6. *See* STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, BACKGROUNDER: IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 1 (2007), http://www.cis.org/articles/2007/back1007.html.

7. *Id.* at 2.

8. *Id.*

9. PASSEL & COHN, *supra* note 1, at 1.

10. *See* 8 U.S.C. § 1325 (2000 & Supp. V 2005).

11. CAMAROTA, *supra* note 6, at 1.

12. *Id.* at 4.

13. *Id.* at 11.

14. *See id.*

15. *See id.*

16. CAMAROTA, *supra* note 6, at 11.

17. *Id.* at 22.

private health insurance than the native-born.[18] In 2005, almost 44% of documented immigrants lacked health insurance—more than three times the rate of citizens.[19] One explanation for the disparity between noncitizens and citizens is that noncitizens are less likely to work in employment sectors that provide health insurance.[20] While almost two-thirds of native-born citizens had employer-sponsored health insurance in 2004, less than 40% of noncitizens did.[21] Although accurate data regarding the percentage of uninsured undocumented immigrants is not available, there is a strong likelihood that the percentage of uninsured undocumented immigrants is greater than documented immigrants.[22] Furthermore, documented immigrants account for 26.8% of all uninsured in the United States, although they make up only 12.6% of the population.[23]

The disparities between elderly citizens and noncitizen also are present in Medicare and Medicaid coverage. In the mid-1990s, virtually all elderly citizens were Medicare beneficiaries; by comparison, only 76% of elderly legal immigrants were beneficiaries.[24] Twenty-two percent of those on Medicare also had supplemental health insurance in contrast to 77% of native-born citizens with supplemental insurance.[25] Medicaid covered 64% of elderly immigrants, while only 12% of native-born citizens were covered.[26] Sixteen percent of elderly immigrants relied completely on Medicaid as opposed to 1% of native-born citizens.[27] Eight percent of immigrants had neither Medicare nor Medicaid, as opposed to 2% of native-born citizens.[28] Until they reach the age of sixty-five, immigrants use significantly less health care than native-born citizens.[29] However, studies have shown that an immigrant's overall health declines the longer

18. MEREDITH KING, CTR. FOR AM. PROGRESS, IMMIGRANTS IN THE U.S. HEALTH CARE SYSTEM, FIVE MYTHS THAT MISINFORM THE AMERICAN PUBLIC 5 (2007), http://www.americanprogress.org/issues/2007/06/pdf/immigrant_health_report.pdf.

19. *Id.*

20. KAISER COMM'N ON MEDICAID & THE UNINSURED, THE ROLE OF EMPLOYER-SPONSORED HEALTH COVERAGE FOR IMMIGRANTS: A PRIMER 2 (2006), http://www.kff.org/uninsured/upload/7524.pdf.

21. *Id.*

22. *Id.*

23. CAMAROTA, *supra* note 6, at 17.

24. ROBERT B. FRIEDLAND & VEENA PANKAJ, HENRY J. KAISER FAMILY FOUND., WELFARE REFORM AND ELDERLY LEGAL IMMIGRANTS 13 (1997), http://www.kff.org/medicaid/1300-elderly.cfm.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* NAT'N IMMIGRATION LAW CTR., FACTS ABOUT IMMIGRANTS' LOW USE OF HEALTH SERVICES AND PUBLIC BENEFITS 1 (2006), http://www.nilc.org/immspbs/research/imms&publicservices_2006-9-12.pdf.

he or she is in the United States.[30] Eventually immigrants are more likely to need long-term care and twice as likely to need personal care assistance.[31]

The United States economy benefits from the contributions of undocumented immigrants who pay in more to government programs than they receive in return.[32] A 2002 study by the National Center for Policy Analysis found that undocumented workers "paid approximately 46% as much in taxes as American-born citizens, but they received only 38% as much from the government."[33] Additional figures demonstrate that undocumented immigrants paid $50 billion in federal taxes from 1996 to 2003.[34] In particular, the Social Security Administration ("SSA") and Medicare benefit from the taxes paid by undocumented workers;[35] annually, undocumented immigrants pay seven billion dollars in Social Security taxes and 1.5 billion dollars in Medicare taxes.[36] According to the 2008 Annual Report on Social Security, undocumented workers pay enough taxes to reduce the Social Security program's projected long-term deficit by 15%.[37]

The Social Security contributions of these six to seven million individuals are held in the SSA's Earnings Suspense File ("ESF"), a compilation of wages earned that "cannot be credited to a specific individual's earnings record because the name and the Social Security Number do not match up."[38] As of 2003, the ESF contained $345 billion[39] a portion of which derives from undocumented workers who do not have a social security number ("SSN").[40]

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30. KING, *supra* note 18, at 7.

31. FRIEDLAND & PANKAJ, *supra* note 24, at 14.

32. Laura Fernandez Feitl, *Caring for the Elderly Undocumented Workers in the United States: Discretionary Reality or Undeniable Duty?*, 13 ELDER L.J. 227, 241-42 (2005).

33. LAUREN MUTTI, NAT'L CTR. FOR POLICY ANALYSIS, IMMIGRANTS, WELFARE AND WORK 2 (2002), http://www.ncpa.org/pub/ba/ba400/.

34. JONATHAN BLAZER & JOSH BERNSTEIN, NAT'L IMMIGRATION LAW CTR., IMMIGRANTS' RIGHTS UPDATE, CONFISCATING CONTRIBUTIONS 1 (2007), http://www.nilc.org/immlawpolicy/CIR/socialsecurity_confcontrib_2007-05-01_iru.pdf.

35. KING, *supra* note 18, at 8.

36. *Id.*

37. Editorial, *How Immigrants Saved Social Security*, N.Y. TIMES, Apr. 2, 2008, at A26.

38. Feitl, *supra* note 32, at 236.

39. *Id.* at 235-36, *citing* August T. Fragomen, Jr. & Steven C. Bell, *Revisions to SSA "No-Match" Letter Program and Impact on Employers*, IMMIGR. BUS. NEWS & COMMENT, Apr. 1, 2003, at 1, *available at* 2003 WL 1560595; Jack E. Perkins, *House Immigration Subcommittee Explores Social Security Totalization with Mexico*, 80 INTERPRETER RELEASES 1296, 1296 (2003).

40. Fietl, *supra* note 32, at 236.

II. MEDICAID AND MEDICARE PROGRAMS AND THEIR AVAILABILITY TO IMMIGRANTS

A. Overview of Medicare and Medicaid Programs

Medicaid and Medicare were created in 1965 to fund health care for three subsets of the population: low-income children, adult disabled, and the elderly.[41] Need is not a factor when determining Medicare eligibility; similar to its Social Security counterpart, Medicare was developed based on a social insurance model.[42] In most circumstances, Medicare is available to the elderly and adult disabled who have made payroll tax contributions for forty quarters.[43] Most Medicare recipients are responsible for premiums, deductibles, and copayments.[44] To help with these expenses, many Medicare recipients obtain supplemental insurance.[45] Some Medicare recipients, known as dual eligibles, have incomes low enough to qualify them for Medicaid, which then covers their premiums, deductibles, and copayments.[46]

As noted in Part I, undocumented workers contribute to both Social Security and Medicare. Many immigrants accomplish this by working under a false SSN[47] or by obtaining a tax identification number from the Internal Revenue Service.[48] At present, naturalized citizens can obtain credit for any period worked while they were undocumented.[49] The SSA will give an undocumented worker who earned income under a false SSN credit for past employment and contributions once documentation is obtained.[50] However, workers who use false SSNs face federal prosecution for a felony and possible deportation—a potential barrier to seeking credit

41. CLAUDIA SCHLOSBERG, THE NATI'L HEALTH LAW PROGRAM, IMMIGRANT ACCESS TO HEALTH BENEFITS 1, 62 (2000), http://www.accessproject.org/downloads/Immigrant_Access.pdf.

42. *See* HENRY J. KAISER FAMILY FOUND., MEDICAID: A PRIMER 2 (2005), http://www.kff.org/medicare/upload/7615.pdf [hereinafter MEDICAID: A PRIMER].

43. *Id.* at 2. Adults under age sixty-five with permanent disabilities who receive Social Security Disability Income payments for twenty-four months are eligible for Medicare, even if they have not made payroll tax contributions for forty quarters. *Id.*

44. *See id.* at 5.

45. *Id.* at 11.

46. *Id.*

47. BLAZER & BERNSTEIN, *supra* note 34, at 1.

48. Nina Bernstein, *Tax Returns Rise for Immigrants in U.S. Illegally*, N.Y. TIMES, Apr. 16, 2007, at B1.

49. BLAZER & BERNSTEIN, *supra* note 34, at 2.

50. *Id.*

for work while undocumented.[51] This barrier was removed in 1990 when federal law was amended to exempt immigrants who were legalized under the Immigration Reform and Control Act of 1986 ("IRCA") from prosecution for illegal use of an SSN number where the sole purpose for using the SSN was employment.[52]

In contrast to Medicare's social insurance model, Medicaid was created on a social welfare model and is only available to low-income elderly.[53] Medicaid is governed by both state and federal law.[54] While federal law creates certain basic program requirements, there are significant state variations in eligibility for services funded.[55] Unlike Medicare, there is no link between work history and Medicaid eligibility. There are no premiums, deductibles, or copayments for Medicaid recipients, as there are for Medicare recipients.[56] Funding for long-term care is another significant difference between the two programs for the elderly. Medicare provides very limited funding for long-term care whereas Medicaid provides total funding for long-term care on an indefinite basis.[57]

In 2000, Congress adopted the Medicaid "emergency medical condition," which covers the cost of emergency medical treatment for immigrants under certain circumstances.[58] Federal law now defines an emergency medical condition as:

> [A] medical condition . . . manifesting itself by acute symptoms of sufficient severity . . . such that the absence of immediate medical attention could reasonably be expected to result in: (A) placing the

51. *Id.* at 4-5.

52. *Id.* at 5. Undocumented workers who misuse social security numbers for any other purpose, such as identity theft, are still subject to prosecution. *Id.*

53. HENRY J. KAISER FAMILY FOUND., MEDICARE: A PRIMER 1 (2007), http://www.kff.org/medicare/upload/7615.pdf [hereinafter MEDICARE: A PRIMER]; MEDICAID: A PRIMER, *supra* note 42, at 2 ("Medicaid was initially created to provide medical assistance to individuals and families receiving cash welfare.").

54. Michael J. McKeefery, Comment, *A Call to Move Forward: Pushing Past the Unworkable Standard that Governs Undocumented Immigrants' Access to Health Care Under Medicaid*, 10 J. HEALTH L. & POL'Y 391, 398 (2007).

55. MEDICAID: A PRIMER, *supra* note 42, at 2.

56. MEDICARE: A PRIMER, *supra* note 53, at 5 ("[Medicare] [b]eneficiaries generally pay varying deductibles and coinsurance amounts . . . "); MEDICAID: A PRIMER, *supra* note 42, at 7 (States may require co-payments . . . . However, federal law limits cost-sharing . . . and prohibits it altogether for . . . [the] elderly . . . .).

57. MEDICAID: A PRIMER, *supra* note 42, at 4.

58. 42 U.S.C. § 1396b(v) (2000); HENRY J. KAISER FAMILY FOUND., MEDICAID AND SCHIP ELIGIBILITY FOR IMMIGRANTS 2 (2006), http://www.kff.org/medicaid/upload/7492.pdf.

> patient's health in serious jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part.[59]

Currently, courts are split as to whether this definition includes acute incidents occurring as part of a chronic condition.[60]

B. Changes in Eligibility for the Medicaid Program Since 1996

The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which passed in 1996, greatly reduced the availability of Medicaid to undocumented workers.[61] PRWORA created "qualified" and "not-qualified" categories of immigrants, making it possible to be "legal" but "not qualified" for Medicaid purposes.[62] Qualified aliens include: lawful permanent residents (persons with "green cards"); refugees; persons granted asylum or withholding of deportation/removal, and conditional entrants; persons granted parole by the Department of Homeland Security for at least one year; Cubans and Haitians; and some abused immigrants, their children, and/or their parents.[63] All other immigrants are "unqualified" including immigrants who are lawfully in the United States.[64]

Prior to PRWORA, some undocumented workers were eligible for government benefits.[65] While undocumented workers were not eligible for Medicaid, there was an exception made for those "lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law."[66] This status, known as "PRUCOL," applied to immigrants whose status was ambiguous, under consideration, or clearly irregular, but not those for whom the Immigration and Naturalization Service ("INS") was actively pursuing deportation.[67] In addition to

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59. *Id.*

60. *See generally* McKeefery, *supra* note 54, at 400-09 (discussing various courts' approaches to the applicability of the exception to immigrants with acute conditions resulting from chronic illness).

61. TANYA BRODER, NAT'L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 4.1 (2007), http://www.nilc.org/immspbs/special/pb_issues_overview_2007-10.pdf ("Low income immigrants in the United States have faced substantial restrictions on access to public benefit programs since the enactment of the 1996 welfare and immigration laws.") [hereinafter OVERVIEW OF IMMIGRANT ELIGIBILITY].

62. *Id.* at 4.2.

63. 8 U.S.C. § 1641(b) (2000). *See also* OVERVIEW OF IMMIGRANT ELIGIBILITY, *supra* note 61, at 4.2.

64. 8 U.S.C. § 1611(a) (2000). *See also* OVERVIEW OF IMMIGRANT ELIGIBILITY, *supra* note 61, at 4.2.

65. *See* Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract With America" Congress*, 90 KY. L.J. 1043, 1046 (2001).

66. Coverage and Conditions of Eligibility for Medical Assistance, 45 Fed. Reg. 30,259 (Nov. 2, 1973). *See also* Costich, *supra* note 65, at 1046. Under the PRUCOL doctrine, an immigrant whose status was ambiguous could be eligible for public benefits. *Id.*

67. *Id.*

eliminating the PRUCOL exception, PRWORA limited access to Medicaid by adding a five-year ban for qualified immigrants.[68] Immigrants who entered the United States after August 22, 1996 have to wait five years after becoming "qualified" in order to receive "federal means tested public benefits," including Medicaid, State Children's Health Insurance Plan ("SCHIP"), TANF, food stamps, and Supplemental Security Income ("SSI").[69] Exceptions to this five-year rule apply to refugees, asylees or those granted withholding of deportation/removal, Cubans, Haitians, Amerasians, victims of trafficking, veterans, and active duty members of the military and their families.[70]

The same year that PRWORA was enacted, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[71] IIRIRA requires immigrants to obtain an affidavit of support from a sponsor that serves as an enforceable contract.[72] Effective December 19, 1997, relatives and employers must sign an affidavit promising to maintain the immigrant at 125% of the federal poverty level and repay any means-tested public benefits the immigrant receives.[73] Prior to IIRIRA, immigrants were required to obtain affidavits, but they were not enforceable contracts.[74] In addition, starting with the passage of IIRIRA, the sponsor's income is deemed to the immigrant until he is a citizen,[75] which may disqualify him/her for need-based benefits.[76]

The most recent amendment to the Medicaid program affecting elderly immigrants was the Deficit Reduction Act of 2005 ("DRA").[77] Starting July 1, 2006, the DRA required all applicants for Medicaid to provide proof of U.S. citizenship.[78] This requirement applies to new applicants and to those applying to renew coverage.[79] Prior to the DRA, applicants could attest to their citizenship under penalty of perjury.[80] The purpose of this

68. 8 U.S.C. §1613(a) (2000). *See also* OVERVIEW OF IMMIGRANT ELIGIBILITY, *supra* note 61, at 4.4.

69. 8 U.S.C. §1613(a) (2000). *See also* OVERVIEW OF IMMIGRANT ELIGIBILITY, *supra* note 61, at 4.4.

70. 8 U.S.C. §1613(a) (2000).

71. Costich, *supra* note 65, at 1043.

72. *Id.* at 1049.

73. 8 U.S.C. § 1183a (2000).

74. Costich, *supra* note 65, at 1047.

75. 8 U.S.C. § 1631 (2000).

76. *Hearing on the Impacts of Border Security and Immigration on Ways and Means Programs Before the H. Comm. on Ways and Means*, 109th Cong. (2006) (statement of Michael Fix, Vice President and Director of Studies at the Migration Policy Institute).

77. 42 U.S.C. §§ 1396b(i)(22), 1396b(x) (2000).

78. NAT'L HEALTH LAW PROGRAM, Q & A: THE DRA'S MEDICAID CITIZENSHIP DOCUMENTATION REQUIREMENTS 1 (2006), http://www.healthlaw.org/library/attachment.82982.

79. *Id.*

80. *Id.*

requirement was to prevent undocumented immigrants from securing Medicaid by false declaration despite the lack of evidence that this problem existed.[81]

C. *State Response*

Immediately following the passage of PRWORA, states passed legislation to extend Medicaid coverage to legal immigrants who became ineligible for Medicaid because of PRWORA.[82] Currently, fourteen states extend Medicaid coverage to legal immigrant children who would not otherwise be eligible.[83] Undocumented children are also covered in some states.[84]

Beginning with Proposition 187 in California, states began passing legislation to limit or completely exclude documents from public benefits. Proposition 187, which passed in 1994, requires that social services providers deny services when they have "determined" or have "reasonably suspected" an applicant or recipient was undocumented.[85] Proposition 187 was found unconstitutional in a federal district court in 1997.[86] Nonetheless, states have continued to pass legislation attempting to limit immigrants' access to services.[87]

III. PROPOSED LEGISLATION TO FURTHER LIMIT IMMIGRANTS' ACCESS TO MEDICARE

In addition to activity at the state level, federal legislators have introduced bills restricting access to care for immigrants. Senator Ensign's proposed amendment to the Comprehensive Immigration Reform Act in 2006 would require the SSA to ignore payments made before a worker became documented when calculating Social Security eligibility and benefits.[88] While this amendment was tabled,[89] it represents a logical

81. NAT'L HEALTH LAW PROGRAM, THE DRA'S MEDICAID CITIZENSHIP DOCUMENTATION REQUIREMENTS 4 (2006), http://www.healthlaw.org/search/attachment.83157.

82. Costich, *supra* note 65, at 1056.

83. *Id.*

84. *Id.*

85. CAL. WELF. & INST. CODE § 10001.5 (West 2007).

86. League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

87. TANYA BRODER, NAT'L IMMIGRATION LAW CTR., STATE AND LOCAL POLICIES ON IMMIGRANT ACCESS TO SERVICES PROMOTING INTEGRATION OR ISOLATION? 1 (2007), http://www.nilc.org/immspbs/sf_benefits/statelocalimmpolicies06-07_2007-05-24.pdf [hereinafter STATE AND LOCAL POLICIES].

88. S.Amdt. 3985 to S. 2611, 109th Cong. (2006); BLAZER & BERNSTEIN, *supra* note 34, at 3.

89. The Motion to Table amendment S.Amdt. 3985 was agreed to by a Yea-Nay Vote of 50-49.

extension of the Congressional approach to health care for elderly immigrants since 1996 and was again considered in 2007.[90]

As noted above, immigrants nationalized under the 1986 IRCA are exempt from prosecution and deportation when the sole reason for their misuse of a SSN was for the purpose of employment.[91] In 2006, the Senate passed the Comprehensive Immigration Reform Act of 2006 with a provision offering this protection.[92] However, the House version of the bill, the Strive Act, did not include an exemption from prosecution for illegal use of an SSN number.[93] Without this provision, many elderly immigrant workers will not apply for Medicare.

IV. CONSEQUENCES OF CURRENT APPROACH

The impact of PRWORA has been significant. Even in states that continue to provide Medicaid coverage for legal immigrants whose benefits would be terminated by PRWORA, nursing homes have denied access to legal immigrants.[94] Studies have documented that participation by noncitizens in all means-tests public benefit programs has declined.[95] Medicaid enrollment by noncitizens decreased from 11.5% to 9.1% from 1996-2001 (as compared to 12% to 10.6% among native citizens).[96] While Medicaid enrollment among noncitizens remained the same from 2000 to 2001, it increased significantly among native citizens.[97]

The documentation requirement under the DRA has created an administrative nightmare for states,[98] even though recent regulations have relaxed the documentation requirement somewhat by permitting acceptance of certain records.[99] For example, these regulations allow acceptance of certain early school or religious documents when a passport or birth

90. BLAZER & BERNSTEIN, *supra* note 34, at 3.

91. *Id.* at 5.

92. *Id.* at 4.

93. *Id.*

94. FRIEDLAND & PANKAJ, *supra* note 24, at 4, citing RACHEL L. SWARNS, *Confused by Law, Nursing Homes Bar Legal Immigrants*, N.Y. TIMES, Apr. 20, 1997, at A1.

95. LEIGHTON KU, SHAWN FREMSTAD & MATTHEW BROADDUS, CTR. ON BUDGET & POL'Y PRIORITIES, NONCITIZENS' USE OF PUBLIC BENEFITS HAS DECLINED SINCE 1996: RECENT REPORT PAINTS MISLEADING PICTURE OF IMPACT OF ELIGIBILITY RESTRICTIONS ON IMMIGRANT FAMILIES 1 (2003), http://www.cbpp.org/4-14-03wel.pdf.

96. MARIE WANG & JOHN HOLAHAN, URBAN INST., THE DECLINE IN MEDICAID USE BY NON-CITIZENS SINCE WELFARE REFORM 2 (2003), http://www.urban.org/UploadedPDF/900621_HPOnline_5.pdf.

97. *Id.* at 3.

98. STATE AND LOCAL POLICIES, *supra* note 87, at 7-8.

99. DONNA COHEN ROSS, CTR. ON BUDGET & POL'Y PRIORITIES, MEDICAID DOCUMENTATION REQUIREMENT DISPROPORTIONATELY HARMS NON-HISPANICS, NEW STATE DATA SHOW: RULE MOSTLY HURTS U.S. CITIZEN CHILDREN, NOT UNDOCUMENTED IMMIGRANTS 5 (2007), http://www.cbpp.org/7-10-07health.pdf.

certificate is not obtainable within forty-five days.[100] The purpose of this provision was to prevent undocumented immigrants from receiving Medicaid; however, data is not showing false attestations by immigrants.[101] In fact, advocates believe that the documentation requirement is primarily affecting U.S. citizens, as immigrants are more likely to have necessary documents.[102]

To the extent that recently proposed comprehensive reform legislation would prevent elderly legal immigrants from obtaining Medicare benefits, it is short-sighted and unjust. The National Immigration Law Center notes that the consequences of such a policy would not be faced until the worker had already contributed to the program for decades and become legalized.[103] Aside from the unfairness of this policy, there is the practical effect to consider—immigrants in this position would have no choice but to turn to Medicaid, placing further strains on that program. During the five year waiting period for benefits following documentation, immigrants may have no choice but to turn to emergency rooms for treatment, thereby unnecessarily increasing costs to the public. Lastly, the incentive for paying into Medicare will be removed—why would undocumented immigrants pay into a system they can never benefit from—even after they become documented?

Opponents of immigration hope, of course, that immigrants will leave the United States upon learning that they will no longer be eligible for Medicare, despite how long they work and even after they become documented. However, data shows that immigrants do not come to or remain in the United States because of our healthcare system or other public benefits.[104] In fact, immigration has only continued to increase as benefits have been cut since 1996.[105] Even if opponents of immigration are correct, and cutting access to Medicare will deter immigration or lead immigrants to return home, the Medicare program will lose millions of dollars in payroll taxes from healthy young workers.[106] As the dependency ratio increases to fifty-nine elderly individuals and children for every 100 workers in 2005 to seventy-two elderly and children for

100. *Id.*
101. STATE AND LOCAL POLICIES, *supra* note 87, at 8.
102. *Id.* at 9.
103. BLAZER & BERNSTEIN, *supra* note 34, at 6.
104. FRIEDLAND & PANKAJ, *supra* note 24, at ii.
105. See KU, FREMSTAD & BROADDUS, *supra* note 95, at 2; PASSEL & COHN, *supra* note 1, at 1.
106. *See supra* notes 32-40.

every 100 workers in 2050, the United States needs all the workers it can get.[107]

PART V—CONCLUSIONS

Contributions by immigrants—both documented and undocumented—can help maintain the solvency of our public health programs for the elderly. Both Medicaid and Medicare are dependent on the earnings of those currently working and benefit from the inclusion of as many working persons as possible. Historically, the law overlooked the legal status of the worker as long as he/she was paying income taxes and FICA. Both for the solvency of our public health programs and out of fairness to immigrant workers, comprehensive immigration reform legislation must, at a minimum, continue to provide protection for immigrants who have made substantial contributions to Medicare and contain provisions exempting legal immigrants from criminal prosecution and deportation for past misuse of a SSN for the sole purpose of obtaining employment and paying into our social insurance programs.

107. PASSEL & COHN, *supra* note 1, at 21.